WM. R. STANSBU
DUE

IN THE

SUPREME COURT

OF THE UNITED STATES

16

OCTOBER TERM, A. D. 1923.

No. 232

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner Appellant,

vs.

EDMUND R. WELLS, ET AL.,
Respondents.

BRIEF AND ARGUMENT
in Behalf of Petitioner Appellant.

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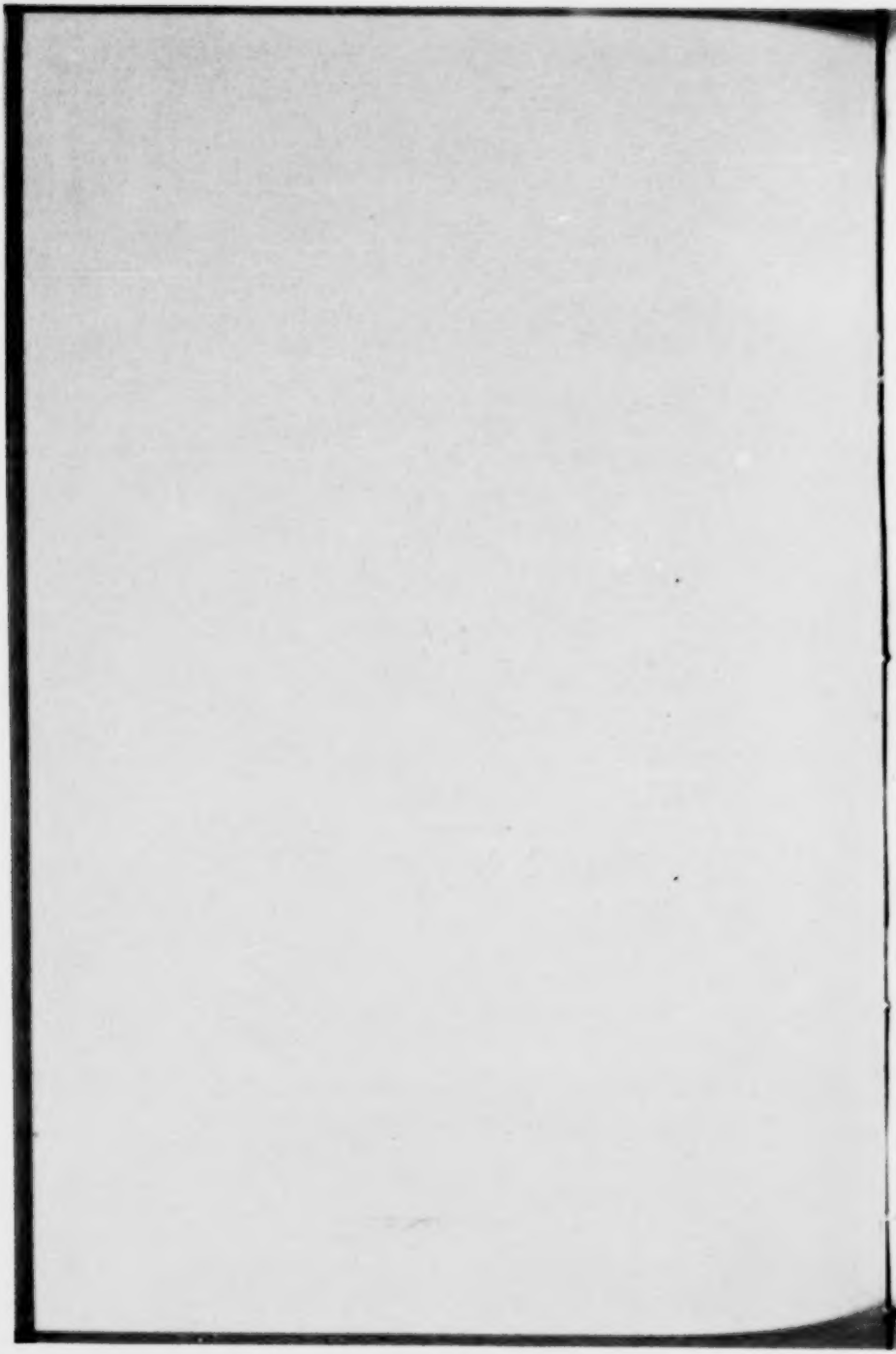

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in Behalf of Petitioner Appellant

Petitioner appellant filed its bill in the United States District Court, Western District of Texas, complaining of respondent Wells as plaintiff and the other respondents as his attorneys of record, who claimed an interest in the judgment, and in which bill it was averred that respondent Wells as plaintiff, a citizen and resident of the State of Colorado, through the other respondents as his attorneys of record, had instituted suit in a State court of Texas against petitioner, a railroad corporation organized and existing under the laws of the State of Kansas and a resident and citizen of said State, for personal injuries alleged to have been sustained by Wells in the State of New Mexico; that in said suit

service had been attempted by publishing notice thereof in a newspaper published in El Paso, Texas; as provided under the laws of Texas; likewise by delivering a copy of said citation and certified copy of petition to the secretary and treasurer of respondent at its office in Topeka, Shawnee County, Kansas; that at the time of filing said suit affidavit was made to the effect that the suit was one against a foreign corporation and that personal service could not be obtained within the State of Texas and that cause of action was founded upon a demand which was unliquidated. Bond was made, and based on said affidavit a writ of attachment was issued, commanding the sheriff of El Paso County, Texas, to attach forthwith so much of the property of petitioner, if to be found in said county, as should be of the value of $15,000.00, same being the amount of damages sought by Wells; that the writ of attachment so issued was by said sheriff returned, not executed, for the reason that no property subject to attachment, belonging to petitioner, could be found in El Paso County, Texas; whereupon Wells, through one of his attorneys, made further affidavit to the effect that the original attachment had been issued and that he believed the Rio Grande, El Paso & Santa Fe Railway Company, a corporation organized under the laws of the State of Texas, a common carrier doing business in El Paso County, Texas, was indebted to petitioner and asked that a writ of garnishment issue. This was done and thereunder said Rio Grande, El Paso & Santa Fe Railway Company was required to answer, under oath, what effects of petitioner it had in its possession and had when said writ was served, and

what other persons within its knowledge were indebted to petitioner. The Rio Grande, El Paso & Santa Fe Railway Company in response to said writ answered that it held certain equipment of petitioner and likewise was indebted to it in the sum of about $151,000.00 for traffic balances. It denied, however, liability under the writ of garnishment on the same grounds that were made the basis of the bill above referred to and made basis of the prayer for injunction by petitioner in the United States District Court. That petitioner did not appear at the November term of the State court to which it had been cited by publication and by notice served upon its secretary and treasurer at Topeka and in no way submitted itself to the jurisdiction of said State court, and on December 21, 1921, that when said case was called for trial, judgment by default was taken against it in the sum of $4,000.00 and on January 24, 1922, judgment was entered in the garnishment suit filed against the Rio Grande, El Paso & Santa Fe Railway Company, wherein all the defenses interposed by it were held for naught and it appearing that garnishee held assets belonging to petitioner of greater value than the amount of the judgment which had been entered against petitioner by default, like judgment was entered against garnishee in the sum of $4,000.00, and that because of which the garnishee was withholding from respondent a sum sufficient to pay the amount thereof.

It was further averred in the bill that petitioner owns and operates lines of railway in the States of Illinois, Iowa, Missouri, Kansas, Nebraska, Colorado, Oklahoma, New Mexico, Arizona, California and Nevada and

is a common carrier of freights and passengers for hire in each of said States; that it does not own nor operate any line of railway in the State of Texas and is not engaged in its business as a common carrier in said State, nor has it done so since the first day of April, 1914; that under the laws of the State of Texas as construed by its courts, no special appearance could be entered by petitioner in the case filed by Wells against it in the State court for personal injuries for the purpose of testing the service of citation nor for the purpose of testing the jurisdiction of the court over it, for that under the said laws an appearance for any purpose will be and is held a general appearance for all purposes and it would thereby have been subjected to the jurisdiction of said court for all purposes, which would have made it necessary for it to have gone to the unusual and unnecessary expense of bringing witnesses from New Mexico in order to make proper defense in said cause, which would have been an unwarranted burden upon and against it and upon interstate commerce, and that the judgment entered against it was without proper service and without appearance; that the issuance of the writs of attachment and garnishment under the circumstances appearing, did not confer jurisdiction upon the courts over it, nor did they fix a lien on the properties of complainant which could be made the basis of a judgment in rem; that any statute of the State of Texas which undertakes to so confer authority and give jurisdiction is void and the attempted enforcement of same would and will deprive petitioner of its property without due process of law, constitute a denial to it of the equal protection of the law,

and contrary to the provisions of the Interstate Commerce Act, 1906, as amended, as well as the Transportation Act of 1920, and that the Legislature of Texas is and was without power to fix jurisdiction in causes of action such as declared upon by Wells or to fix any lien on or against funds or property belonging to complainant that may be in the possession of a resident of Texas; that the moneys and properties impounded under the garnishment proceeding were not subject thereto and plaintiff in the writ obtained no lien thereon which could be foreclosed prior to the entry of a valid judgment against petitioner; that the funds so impounded represented balances due to petitioner from garnishee as its proportion of transportation charges due entirely on interstate traffic, earned entirely on business conducted wholly without the State of Texas, and which funds were needed in the carrying on of its transportation business beyond the limits of the State of Texas, and to withhold the same under the writ of garnishment would be violative of the amended Act to Regulate Commerce, as well as the Transportation Act of 1920, and would be an undue burden on interstate commerce; that the cars, engines and other railroad equipment impounded under said writ, were lawfully in the possession of garnishee under contract with petitioner, under and by which garnishee was entitled to possession thereof as a common carrier of interstate freights and passengers, all such having been delivered to garnishee by petitioner as a connecting carrier and which would have been returned to it in due course of business and were each and all needed by complainant

in the conduct of its business as an interstate carrier and none of same is or was subject to the writ of garnishment and that to withhold the same was violative of the provisions of the Interstate Commerce Act as well as the Transportation Act of 1920, and the equipment so impounded was beyond the reach of process of the District Court of El Paso County, Texas; that for many years it has been the custom of carriers to allow their freight charges to follow the shipment so that the delivering line collects the entire freight charges of all carriers over whose lines the shipment moves, and the delivering carrier accounts to the other carriers for their proportion of the transportation collected; that for many years it has been the custom, for the convenience of passengers, for the initial line to sell tickets and coupons good for transportation over connecting lines and to collect from the passenger the entire amount and account to the connecting lines for its or their proportion thereof; that garnishee owns a railroad only twenty miles in length extending from El Paso to the Texas-New Mexico State line, where it connects with the railroad of complainant; that El Paso has a population of more than 50,000 people and has a large commerce originating therein and passing through; that in order to properly serve that community and its commerce without subjecting it to undue prejudice, disadvantage or discrimination and to comply with the provisions of the Act to Regulate Commerce, it is necessary for petitioner, as it has done in the past, to permit its cars and engines to run over the railroad of the garnishee to and from El Paso and to permit gar-

nishee to collect the freight charges and the portion thereof accruing to petitioner from freight passing over its line to El Paso, and to permit garnishee to sell tickets good for passage over petitioner's line; that the moneys due complainant by garnishee and impounded under the writ of garnishment were moneys so collected and if the statutes of the State of Texas are so construed as to authorize the seizure by attachment of its cars and engines while in the possession of garnishee or to authorize the seizure by garnishment of the moneys due and to become due petitioner by the garnishee for freight and passenger charges for account of petitioner, such statutes so construed will impede and obstruct petitioner in the performance of the duties imposed upon it by the Act to Regulate Commerce and will obstruct and be a burden on interstate commerce and the Interstate Commerce Commission in the performance of its duties imposed by the act and the said statutes so construed will deprive complainant of its property and rights without due process of law; since it is not due process of law when requiring complainant by the Act to Regulate Commerce to permit its cars and engines to run into El Paso and to permit the garnishee to collect its freight and passenger charges and then to require petitioner to submit to the jurisdiction of the State courts at El Paso on causes of action by citizens and residents of other States, originating in such other States, which have no relation whatever to any traffic or transportation to or from El Paso or to any business or thing therein, and such would be the result if the procedure resorted to and herein complained of should be sustained, and such

statutes so construed would be and are contrary to the constitution of the United States and the laws enacted thereunder, and by reason of said writ of garnishment petitioner is deprived of the use and benefit of the funds so withheld.

It was further averred that demand for payment of the judgment above referred to had been made, that the garnishee would comply with the command unless the enforcement of the judgment is prevented, and if the amount is paid petitioner would have no recourse at law as Wells is insolvent and the amount of the judgment so paid to him could not be recovered and same would not be voluntarily returned, and that to withhold the said funds would be violative of the constitutional immunities to which it is entitled; that it has been judicially determined that petitioner is not doing business in Texas and is not subject to the jurisdiction of the courts therein and that it will work a great hardship upon it and be a burden upon interstate commerce, violative of the constitution to require it to litigate suits originating in other jurisdictions in El Paso and in which it will be necessary to bring its witnesses from long distances at great expense, all of which is wholly unnecessary, there being courts of competent jurisdiction in each of the States through which it runs and does business, wherein any and every cause of action against it may be heard and determined, and that the attempted garnishment herein was not a bona fide effort to reach the assets of petitioner, it being amply solvent and having property more than amply sufficient, subject to execution, in each of the States through which it operates and does busi-

ness to more than satisfy any demand that Wells might have against it; that the institution of said suit by Wells in the District Court of El Paso County, Texas, and the issuance and service of the writ of garnishment herein is part of a general scheme to re-establish jurisdiction in El Paso county in causes of action such as was declared upon by Wells and further causes of action arising in other States against foreign railway corporations, and this petitioner in particular, and for petitioner to submit thereto would be a burden on interstate commerce and hamper it in its business as a common carrier without the State of Texas and subject it to the great and unnecessary expense of litigation far removed from the scene where the cause of action against it arose; that it would be greatly hampered in its defense therein in that its witnesses would be required to come great distances at added expense, which would be a burden upon interstate commerce and in addition to which it would be required to substitute the services of other and less experienced employes than those who were required to be absent from their labors, and that it should not be required to waive its constitutional right which has thus been invaded; that there is no just, lawful or equitable reason or cause why such suits could not be instituted and prosecuted in the respective States where the injury occurred and where service can be had upon petitioner and the issues fairly determined.

The defendants named in said bill for injunction each waived notice and filed answer to the merits and the cause was submitted on an agreed statement of facts, and in said statement the matters of fact as averred in

the bill of complaint were admitted, and wherein it further appeared that prior to the entry of the decree in the case of petitioner against J. F. Weeks, et al, numbered 109 in Equity on the docket of the District Court of the United States, Western District of Texas, it was determined that petitioner was not doing business in Texas and not subject to suit within said State, and that it had been the practice of attorneys residing in El Paso to institute suits against it in the State courts for personal injuries arising in the States of Illinos, Kansas, Colorado, New Mexco, Arizona, Missouri and California, and wherein the plaintiffs, respectively, were nonresidents of the State of Texas; that there had been filed prior to the time the bill was exhibited in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State courts of El Paso County for personal injuries occurring in the States above named, and in which many thousands of dollars were involved, and in which cases, in order to prevent default, it was necessary for petitioner to defend and it so defended by bringing numerous employes from their regular work in such other States to El Paso to testify, and during the absence of said employe witnesses from their regular work substitutes were employed at great expense to perform the services of said employes; that since the entry of the final decree in the Weeks case no suits had been filed in the State courts of El Paso County against petitioner until the institution of the suit herein complained of, and that had the Wells case been instituted in any State through which petitioner operates it would have filed

answer denying liability and have defended to the extent of its ability.

That in 1913 the Legislature passed an act now known as Chapter 247 A, Revised Statutes of Texas, which reads as follows:

> "An Act to amend Chapter One, Title Eleven, of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247-A, providing for the issuance of attachments in suits against persons, co-partnerships, associations or corporations, upon whom personal service can not be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.
>
> "Be it enacted by the Legislature of the State of Texas:
>
> "Section 1. That Chapter One of Title Eleven of the Revised Civil Statutes of this State, adopted in the year A. D. 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247 A, as follows:
>
> "Art. 247 a. Provided that nothing in this chapter shall prevent the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service can not be obtained within this State, founded in tort or upon demands, which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attachment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

"Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage and it is so enacted.

"(Note.—H. B. No. 57 was passed by the House by a two-thirds vote: yeas 104, nays 3; and was passed by the Senate by a two-thirds vote: yeas 28, nays 0).

"Received in the Executive Office August 19, 1913, and filed in the Department of State August 20, 1913, without the approval of the Governor.

"Became a law August 20, 1913."

The United States District Court denied relief sought by petitioner and from this decree an appeal was prosecuted to the United States Circuit Court of Appeals, Fifth Circuit, and the decree entered below was by that court affirmed. All questions arising on the record were duly presented by proper assignments of error and petitioner appellant respectfully here presents on the record the following as its

BRIEF OF ARGUMENT

Some of the questions arising on the record grow out of the Texas Statute as written and others involve the larger question as to the effect of this statute when attempt is made to enforce same against an interstate carrier under the circumstances existing in a cause such as this. We therefore ask permission to present our

views upon each of these questions, not, probably, in the order of their importance, but as they seem to arise.

FIRST: THE TEXAS STATUTE, ARTICLE 247 A, DID NOT AUTHORIZE THE ISSUANCE OF THE WRIT OF GARNISHMENT.

Prior to the passage of this act neither the writs of attachment nor garnishment could issue in an action founded upon an unliquidated demand under the laws of Texas. Such writs could issue only where the amount of the demand was certain or liquidated.

Hochstadler vs. Sam, 73 Texas 315.

Grocery Co. vs. T. & P. Railway Co., 95 Texas 486.

Armengol vs. Richter, 141 S. W. R. 1028.

It is contended by respondent that the issuance of the garnishment was authorized under the Article 247 a, aided by the original attachment statute in the State.

As appears from the statement of facts, affidavit and bond for attachment was made and thereon writ of attachment issued, which was by the sheriff of El Paso County, Texas, returned "No property of defendant in said writ found in El Paso County, Texas." And based upon such affidavit and bond for attachment, Wells, through attorney, made the affidavit which appears as "Exhibit B" therein filed. (Printed Record 23) And thereon writ of garnishment directed to the Rio Grande, El Paso & Santa Fe Railway Company was served. Garnishee duly answered. (Printed Record 24-30).

While admitting in such answer an indebtedness to the original defendant in many thousands of dollars,

liability under the writ of garnishment was denied, all of the defenses being set up which were made the basis of the bill for injunction herein.

Afterwards, and on December 21, 1921, petitioner as the defendant in the suit instituted by Wells, having made default, and no appearance for it being entered in said suit, judgment was taken against it in the sum of Four Thousand Dollars and costs. It was further recited in this judgment that the plaintiff had sued out an attachment and had caused to be issued a writ of garnishment summoning the Rio Grande, El Paso & Santa Fe Railroad Company to answer as garnishee what, if anything, it was indebted to the defendant, and the garnishee having answered, showing that at time of service of said writ it was indebted to defendant in a sum far in excess of the amount of said judgment and costs, and had in its possession effects of defendant, it was adjudged that the recovery in favor of plaintiff against the Atchison, Topeka & Santa Fe Railway Company is only effective against it to the extent that same may be satisfied in proceedings against the garnishee, and that no execution issue on said judgment against said original defendant, save and so far as may be permitted or authorized by an order of the Court in said garnishment proceeding, the Court not having yet determined to what extent it will render judgment against the garnishee. (Printed Record 30).

Afterwards, and on January 24, 1922, the garnishment case was heard, all the defenses interposed by the garnishee were held for naught and garnishee was ad-

judged liable to the plaintiff for the amount of the judgment previously entered against the defendant, it having been determined by the Court that the garnishee had in its possession assets belonging to the defendant of far greater value than the amount of the recovery. (Printed Record 31-32).

So that by reason of the service of the writ of garnishment, the Court determined that there was jurisdiction over petitioner; that the amount of the damage was Four Thousand Dollars and that as garnishee had in its possession effects belonging to the defendant of greater value than the amount of judgment, recovery was awarded against it to the extent of the recovery in the original case, a personal judgment being rendered against the garnishee for the amount of the judgment awarded against this petitioner.

It appears, without controversy, that petitioner is a foreign railroad corporation doing no business in Texas, having no line of road in that State, that the cause of action against it arose in the State of New Mexico, that at the time of the accident the plaintiff was a citizen of the State of Colorado; that petitioner had and has more than sufficient assets in said State, as well as in the others through which it operates, to more than satisfy any demand that plaintiff could establish against it, there being Courts in each of said jurisdictions wherein redress could be obtained. That garnishee, Rio Grande, El Paso & Santa Fe Railroad Company owns and operates a line of road from El Paso to the boundary between the States of Texas and New Mexico where it connects

with the line of petitioner, the two forming a continuous line from El Paso to various stations on the line of petitioner in the numerous States through which it operates. That it is usual, and practically necessary, for freight charges on shipments originating on the line of petitioner to follow and be collected at El Paso, where same is the destination of shipment; that in the sale of tickets from El Paso to points on the line of petitioner, charge for the entire transit is collected at point of origin; that the cars and engines and other equipment of petitioner used on the line of the garnishee company were so used under contract between the two carriers, under which garnishee is entitled to the exclusive use and possession of same while so in its possession, and that it is necessary that the cars of petitioner containing shipments destined for El Paso should be run through to destination and that it is required to allow this to be done; that all of the funds impounded under the writ of garnishment represent the proportion due by the garnishee to petitioner, not only on interstate business, but solely for business done by petitioner entirely beyond the limits of the State of Texas; that none of same was earned or accrued to petitioner for anything done or performed within the State of Texas and that such funds are needed by it in the conduct of its business and in order to perform the service enjoined upon it by the laws of Congress, lawful rules of the Interstate Commerce Commission, as well as the laws of the various States through which it operates, and that the equipment of petitioner in the hands of the garnishee at the time the writ was served was equipment so likewise needed and

to be used by petitioner when the same should in due course of business be returned to it.

We want in this connection to especially emphasize the fact that none of the funds so impounded had situs within the State of Texas, and that all of same accrued to petitioner in the conduct of an interstate transportation business conducted as required by law, and all beyond the limits of the State of Texas.

The agreed statement of facts fully outlines the status of the relation between the two companies and the rights of petitioner to the funds in question. (Printed Record 35-42).

Respondent contended that the proceeding was justified by Article 247 A of the Texas Statute, and that having complied with that and the succeeding Article, jurisdiction was obtained under the writ of garnishment over petitioner to the extent of the funds impounded.

It is the rule of decision in Texas that the right to the process of garnishment will be strictly construed against plaintiff in the writ, and every intendment will be indulged in favor of the garnishee. Jameson v. Scarborough, 56 Tex. 358, and many other cases.

Starting with the premise that prior to the passage of the above Statute there was no right to the issuance of the writ of garnishment on an unliquidated demand, we say that the Statute in question does not authorize its issuance. Attachment and garnishment are not one and the same, and without a Statute authorizing, neither process can issue in any cause. By its terms this

Statute only permits the issuance of attachment and nowhere authorizes the process of garnishment. Bear in mind that under the writ of attachment in this proceeding no property was found. Whatever was obtained was under the writ of garnishment; in fact, a debt is not capable of manual seizure and therefore cannot be reached under attachment. C. R. I. & P. Ry. v. Sturm, 174 U. S. 715.

Believing as we do that the rule is universal that the right to the extraordinary process of garnishment is strictly construed, that nothing will be allowed by way of intendment in favor of the right, this statute clearly negatives an intent to authorize its issuance.

It will be presumed that the Legislature knew the state of the law in Texas at the time this act was passed, and that it had been held that the process of garnishment could not issue in aid of an action for damages, and this knowledge being charged to the Legislature and the act not directly authorizing its issuance on an unliquidated demand, we are warranted in assuming that the act expressed all that the Legislature intended by way of enlargement on the right to extraordinary process, and not only do we so assume, but as a matter of law, there was no enlargement as to the right of the process of garnishment. The fact that under the original garnishment Statute the writ might issue where it was made to appear that attachment, with affidavit and bond therefor had been made, cannot aid for the reason that under the original garnishment Statute the cause of action declared upon must be liquidated, and it is only where the demand is liquidated that the writ of

garnishment may issue by virtue of a previous affidavit and bond in attachment or garnishment. The Statute in question was and is only an enlargement of the right to the writ of attachment as same had previously existed, and under the circumstances made there to appear. So that we contend initially that the Statute itself negatives the right to the process used in this case to obtain jurisdiction over appellant.

SECOND: THE GARNISHMENT FIXED NO LIEN WHICH COULD BE ENFORCED AGAINST THE PROPERTY IMPOUNDED.

A review of Chapters 1 and 2, Title 11, Revised Statutes of the State of Texas, will, as we believe, lead to the conclusion that the service of the writ of attachment or garnishment only creates a lien which can be enforced in some of the methods pointed out in these chapters, AFTER a valid judgment has been obtained against the original defendant.

Under the heading "Attachments," Article 267 provides in effect that the execution of a writ of attachment creates a lien from the date of the levy on such personal property as remains in the hands of the attaching officer and the proceeds of such personal property as may have been sold.

Article 268 provides that should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens.

As to garnishments, Article 293 provides for a judgment against the garnishee for the amount admitted or found to be due, unless such amount shall exceed the

amount of plaintiff's judgment against the defendant, in which case it shall be for the amount of the judgment, interest and costs. Please note that this Article pre-supposes judgment against the original defendant.

Article 294 provides that where it appears from garnishee's answer that garnishee has effects of the defendant liable to execution, the Court shall render a decree requiring the garnishee to deliver up to the sheriff presenting an execution in favor of the plaintiff against the defendant, such effects or so much thereof as may be necessary to satisfy the execution.

In short, it definitely appears from these various provisions that under the Statutes of Texas plaintiff *must obtain a valid personal judgment against the original defendant* on which the lien may be foreclosed or under which, when an execution issues, property may be sold in some of the methods designated

As said above, the judgment entered in the garnishment proceeding always pre-supposes a valid judgment against the original defendant. The Supreme Court of Texas has in effect so held. Sun Mutual Insurance Company v. Seeligson, 59 Tex. 3. Kelly v. Gibbs, 84 Tex. 147. We quote from the Seeligson case:

> "It is true that there can be no valid judgment against a garnishee unless there be a judgment against the defendant, and for this reason garnishee is entitled to have an inquiry made as to whether or not, when a court has assumed to render a judgment against a defendant, it had jurisdiction over his person and over the subject matter of the suit, for if it had not, a judgment against the garnishee would be no protection to him.

"If, however, the Court had jurisdiction of the person of the defendant and of the subject matter of the suit, then the garnishee cannot be heard to question the conclusiveness of the judgment as between the plaintiff and the defendant, for the judgment against himself in such case will be full protection to him for any payment he may make under it. . . . . .

"The garnishee not only has the right to resist a judgment against himself until there is a valid judgment against his creditor or the person for whom he holds property, but he has the right and it is his duty to resist a judgment against himself until the Court has jurisdiction over him; otherwise any payment he might make would be a voluntary payment and the judgment would be no protection to him, for it would not be binding upon him if the Court which rendered it had no jurisdiction over him."

It may be that the Legislature could have provided, in case of a non-resident, for the rendition of a judgment against him to extent of the property impounded, this in the nature of a judgment in rem, but there is no such provision. The Legislature has not so provided, and as the Court may not legislate or exercise the function of a Legislature, neither may it supplement an act of the Legislature, and because of this we urge that the only legal effect, in any event, that may be given to Article 247 A, supra, is to hold that it creates a lien or impounds property to be held in legal custody until such time as plaintiff may secure a valid judgment against the defendant, and such a judgment can not be obtained in Texas against a corporation that is not doing business in the State. A. T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513.

And it occurs to us that unless this construction is placed upon the Article 247 A, it is directly in the face of Pennoyer v. Neff, 95 U. S. 714.

It may not be amiss in this connection to quote that case at page 728:

> "But the answer to this position has already been given in the statement that the jurisdiction of the Court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect can not be made to depend upon facts to be ascertained after it has tried the case and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the Court before it is rendered, not upon what may occur subsequently."

We may in this connection refer to Hochstadler v. Sam, 73 Tex. 315, in which it is held that where juris-

diction is sought by virtue of an attachment, if the attachment fails, there is no jurisdiction.

We must be mindful that, as a general proposition, petitioner is not subject to the jurisdiction of the courts in Texas, and therefore that no personal judgment can be entered against it in that State without a voluntary submission to jurisdiction.

The Article 247 A of the Statutes of that State must of course be construed in connection with the other Articles of Chapter 1, Title 11, Revised Statutes. And the only constitutional effect that can be given to this Article 247 a is to construe the same as fixing A LIEN UPON TANGIBLE PROPERTY LOCATED WITHIN THE STATE, AND TO MAKE THE PROCEEDING ONE IN REM ONLY, and when this construction is so placed there is the want of authority to foreclose the lien so fixed until there has been rendered a valid judgment against the original defendant.

Of course, the service by publication sought to be obtained against petitioner would not support a judgment and as the judgment rendered against this petitioner on such service was void, it certainly was not vitalized, nor the judgment entered more effective by reason of a subsequent judgment against the garnishee. The vitality of the judgment against the original defendant must of course be determined as of the time when it was entered and can not become more effective by reason of a subsequent proceeding against a garnishee. Again we quote from Pennoyer v. Neff. At page 727 it is stated:

"In other words, such service may answer

> in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State can not run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligations upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

So that as there is no Statute in Texas authorizing as against a non-resident, judgment against him to the extent of property impounded and as the courts may not import into a Statute any additions thereto, the conclusion would seem to be forced that in the present proceeding there could be no valid judgment rendered against the garnishee until a proper judgmeat had been entered against the original defendant.

It has been held that the original defendant is not required to take notice of a garnishment proceeding and is not concluded by the judgment entered therein. Mo. Pac. Ry. Co. v. Whipser, 77 Texas 16.

Not only so, but every intendment should be indulged in favor of the absent defendant and Statutes which seek to subject him to the jurisdiction of a foreign court are never liberally construed. As indicating the modern trend we quote from Missouri Pacific Ry. Co. v.

Clarendon Boat Oar Co., 42 Sup. Ct. Rep. 211, wherein Chief Justice Taft used this language:

> "Provisions for making foreign corporations subject to service in the State is a matter of Legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. Indeed, so clear is this that in dealing with Statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State."

And, as such, then, is what is therein designated the "leaning" of the Court as to foreign corporations doing business in a State, how much stronger would be this leaning as applied to foreign corporations who have been adjudged non responsive to litigation within the State.

We therefore urge that, in the circumstances, to enforce the judgment complained of would be as to petitioner a denial of the equal protection of the law, and the effect will be to deprive it of its property without due process of law.

The questions at issue have been discussed, having reference solely to the local law. There is, as we believe, the larger questions involved as to the rights of petitioner accruing to it under the Constitution of the

United States and laws enacted thereunder, as well as duties enjoined which have been by the proceedings, here complained of, invaded. These questions as they seem to arise are:

FIRST: ENFORCEMENT OF THE JUDGMENT ENTERED IN THE STATE COURT AGAINST PETITIONER WILL BE, IN VIEW OF ALL THE CIRCUMSTANCES, CONTRARY TO THE COMMERCE CLAUSE OF THE CONSTITUTION, OF THE INTERSTATE COMMERCE ACT, AND THE TRANSPORTATION ACT OF 1920.

Initially we suggest that the Circuit Court of Appeals was inaccurate in its statement to the effect "In Texas the railway company was engaged only in interstate commerce." Admittedly, as a fact, it was not engaged in any character of business in Texas, nor, as a matter of law was it so engaged. The Circuit Court of Appeals in A. T. & S. F. Ry. Co. v. Weeks, 254 Fed 513, so held, and a petition for certiorari in that case was by this Court denied. (249 U. S. 602). It is admitted that unaided by the extraordinary writs of attachment or garnishment no jurisdiction in causes of action such as was here declared upon can be obtained over petitioner in Texas. We have contended, supra, that even under the local law petitioner could not be so subjected even aided by such process, but passing to the greater question as embodied in the proposition above asserted, what is the status? We shall not set out verbatim either the applicable portions of the Act to Regulate Commerce, 40 Stat.—L. 101, or the Transportation Act of 1920. Section 402, 41 Stat.—L. 476, but shall present a general resume.

An analysis of the Act to Regulate Commerce, as amended (Paragraph 4, Section 1), makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable division of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6, Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when

of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service without regard to ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality or any particular description of traffic to any unreasonable prejudice or disadvantage whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

It appears from the facts that for many years it has been and is now the custom and practice of carriers to allow their freight charges to follow the shipment,

so that the delivering line collects the entire freight charge for all carriers over whose lines the shipment is moved, the delivering carrier accounting to the other lines for their proportion of freight collected; that it has been and is customary, in order to serve the convenience of passengers, for the initial line to sell tickets good for transportation over connecting lines and to collect from passengers the entire charge and account to the other lines for their proportion thereof; that there is a very large commerce originating at, destined to and passing through El Paso; that the cars and engines and other railroad equipment belonging to petitioner and in the possession of garnishee were so in its possession under a contract between petitioner and garnishee, under which garnishee was entitled to the exclusive use and possession thereof while needed on its line of road, and that same would have been needed and used by petitioner in the conduct of its business as an interstate carrier when returned by garnishee to it; that the moneys impounded under the writ of garnishment are for services, not only rendered entirely beyond the limits of the State of Texas, but also same are needed and would have been used by petitioner in the conduct of its business as a common carrier, and as required by law.

In other words, it definitely appears that the cars, engines and railroad equipment, as well as moneys impounded under the writ of garnishment, were each and all instrumentalities necessary for the use of petitioner in the conduct of its business as a common carrier. Can these instrumentalities be interferred with

or interrupted by reason of a local Statute? That such has been the effect in this case may not be denied.

Plainly, under the provision of the Interstate Commerce Act the petitioner cannot except El Paso from the custom outlined without violating the provisions of such Act, for to do so would subject El Paso to undue prejudice and disadvantage. The acts regulating commerce contemplate free interchange of cars and engines between connecting lines of railroad and the use by one of the cars and engines of the other, it evidently being the view of Congress that such will promote the handling of interstate traffic. It was evidently also the view of Congress that the practice of the charges following the freight and the sale of through tickets should continue, as carriers are required to establish through routes and such practices are reasonably necessary for practical operation. Under such circumstances is it due process of law for a State to provide for the attachment of such equipment or the garnishment of funds so arising in cases on foreign causes of action in which the citizens of the particular State are in no way interested? Can the State impose such a penalty on the carrier for complying with the acts of Congress? Aside from the question of due process of law, is not such action or attempted action by a State an interference with and an impediment to interstate commerce? The necessary tendency of such attempted action is to deter carriers engaged in interstate commerce from carrying out the policy of Congress with respect to through routes and through traffic and the interchange of engines and cars.

It has often been decided that the right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive powers. We contend that by reason of the amendment to the Interstate Commerce Act, as well as the Transportation Act of 1920, this exclusive power as to the subjects of this litigation has been manifested, and that thereby the same has been removed from the sphere of State action and that therefore the State has not the power to interfere with or impede the continuity of interstate transportation, and that such has been the effect of the uses to which a local Statute has been applied in the instant case can not be doubted.

We shall not quote, extensively, authorities in support of the proposition above asserted, but refer to Southern Railroad Co. v. Railroad Commission, 236 U. S. 447, holding that local Statute requiring railroads to place grab irons on cars is superseded by the Federal Safety Appliance Act. Erie Railroad v. New York 233 U. S 681, holding the labor law of New York relating to hours of service of telegraph operators void as conflicting with Federal Hours of Service Act. Mo. Pac Railroad v. Washington, 222 U. S. 370, holding hours of service act ineffective because in conflict with the Federal Act. McDermott v. Wisconsin, 228 U. S. 132, holding the Wisconsin act relating to labeling syrups void as conflicting with Federal Food & Drug Act. Adams Express Co. v. Croninger, 226 U. S. 506,

holding the Carmack Amendment supersedes State regulations on the same subject. Mondou v. Railroad Company, 223 U. S. 55, holding the Federal Employers' Liability Act exclusive. Louisville & Nashville R. R. v. Hughes, 231 Federal 739, holding Ohio Act for extension of equipment of locomotive boilers superseded by Federal Act.

So that there being no doubt as to the general rule, let's see the application. In the Interstate Commerce Act, prior to the recent amendment, nothing was undertaken in behalf of the Federal Government relative to cars or car service, except to include them under the general definition of transportation in the first section, but under the amendment of 1917, it is provided:

> "The term car service as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation by any carrier, subject to the provisions of this Act."

Just rules and regulations are provided for. Penalties prescribed for violation.

The same subject was treated in the Transportation Act of 1920. Definitions of the Interstate Commerce Act were retained, and car service defined as including the use and return of locomotives, cars and other vehicles, plainly indicating that the return of empty cars is a part of car service over which Congress gave the Interstate Commerce Commission the widest jurisdiction.

It also gave jurisdiction for the use of terminal facilities, etc., and because of the assumption by Con-

gress of the controls enumerated, State power thereover ceased, and herein lies the distinction as to the rights of petitioner and those considered by this Court in Davis v. C. C. C. & St. L. Railroad Co., 217 U. S. 157, so much relied upon by respondents.

We have undertaken to point out the difference in the state of the law at the time the Davis case was decided (1910) and at the present time. Mr. Justice McKenna necessarily considered the subject, having in mind the Interstate Commerce Act as it then stood. The inference is quite strong, however, as he several times referred in the opinion to Congress and its power in the premises, that it was not the intention to hold that if Congress had assumed control of the entire field of interstate transportation that the Iowa Statute there under discussion would be effective, and no contention could have been made in that case by the Railroad Company that the laws of the State interfered with interstate commerce, nor that they were directly contrary to the Acts of Congress. It is further said in the opinion that Congress had not intended, by the Interstate Commerce Act, to abrogate the attachment laws of the States, and possibly in the state of the law as it existed at that time, there was no inference that the laws of a State regulating commerce interrupted or violated any provision of a Federal act. But, this can not be true now.

A reading of the Interstate Commerce Act, as well as the Transportation Act of 1920, must lead to the conclusion that Congress has assumed control of the entire field of interstate commerce, including each and

all of the instrumentalities thereof; otherwise, a carrier could not comply with these acts. If, in the face of the requirements thereof the means of complying therewith may be regulated, impeded or interrupted by the local laws of each State, then the carriers will indeed be in a helpless condition, subjected upon the one hand to a penalty for their failure to conduct transportation as required by Congress, and to be practically enjoined from so doing by the police regulations of each State.

The highest obligation of the carrier is to the public. This is the keynote to the Acts of Congress, and we are not at all sure but what by reason of these acts the instrumentalities needed in the conduct of that business have been put away in a kind of a civil sanctuary.

The requirements of the Federal Act are imperative. Service is required. Exchange of equipment is required. The rates prescribed by the Interstate Commerce Commission have for their purpose primarily the gathering of funds sufficient to enable the carriers to perform the service required, and if, by garnishment process in a foreign jurisdiction on a cause of action arising elsewhere, these funds may be diverted under a local Statute, the continuity of service will be to that extent interrupted.

It must be noted that Mr. Justice McKenna in the Davis case was careful to limit the effect of the decision to the facts there appearing, and necessarily to the law as it then existed. There has been great advance in the solution of the various railroad problems that

have been troublous during the past few years. The demands of the public for uninterrupted and prompt service; yes, the growing demand therefor was the moving spirit behind the Amendments to the Acts of Congress regulating carriers. The thirteen years intervening since the pronouncement of Mr. Justice McKenna as above, have been wrought with changes more rapid and drastic in the control of the transportation of this country than ever before, or that our forefathers ever dreamed would be taken, and as a result of which every activity of an interstate carrier is under control of some law or the regulation of the Interstate Commerce Commission.

It would seem that no phase of the subject has been left untouched, and as Congress stepped in, and by each successive act assumed greater control, the power of the States receded relatively.

There is no longer, insofar as this subject goes, such a thing as dual control, Congress in effect having said to the carriers:

> "The Federal Government will hereafter regulate all of your activities from the moment a pound of freight to be transported interstate is received, until the car containing the same has been returned to its home terminal. Your power to borrow money for the conduct of your business will be controlled. The issuance of your securities shall be regulated. The wages of your employes will be fixed."

Indeed, this control is so complete that even the right to build new or additional lines is regulated. And, having so entirely surrounded the carrier, even

to say that a State may by local Statute seize any of these instrumentalities on a cause of action sounding in tort in a State wherein a particular carrier is not doing business, is inconceivable; and a local law which so authorizes would appear to be so plainly violative of the control of the carrier, and its activities, as evidenced by the Acts of Congress, that no argument should be deemed necessary. And yet, such is not only the theory but the effect of what is sought in the action instituted by Wells.

It would seem to be plain, in view of what Congress has said, that the State is deprived of the right to interfere with the handling or distribution of cars, or to issue any process which would impede regular and orderly interstate transportation or deprive the carrier of funds necessary for that purpose, and not only so, but it is the policy of the law to keep lines of transportation open and to require continuous transit between connecting carriers, as well as interchange of cars, in the interest of the general public, and these needs may not be interfered with by the State; and that this has been the uniform tendency for many years, we have only to cite St. L. & S. W. Railroad v. Arkansas, 217 U. S. 136, wherein a State Statute, which undertook to control a Railroad Company to distribute cars in a particular manner and as per an order issued by the Railroad Commission of the State, was held to impose a burden on interstate commerce, and was unconstitutional under the commerce clause of the Constitution.

It thus appears that the entire field of interstate transportation has been fully occupied by Congress, and that its regulations are, as to the carrier, so complete and conclusive as to exclude from all consideration State control or interference therewith, and because of which any construction of the Texas Statute so as to authorize thereunder the seizure by attachment of cars and engines of petitioner while in the possession of connecting carrier or as authorizing the seizure by a writ of garnishment of moneys due or to become due petitioner by garnishee, for freight and passenger charges for account of petitioner, same having been collected by garnishee as the delivering transportation line, will necessarily impede and obstruct this petitioner in the performance of the duties imposed upon it under the Act to Regulate Commerce, and not only so, but that same will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and enjoined upon the carrier.

Not only are the acts regulating commerce materially different from what they were when Davis v. C. C. C. & St. L. R. R. Co., 217 U. S. 157, was decided, but it was not made to appear there, as it does here, that the result of sustaining the garnishment proceeding would be to cause a flood of foreign litigation, hereinafter discussed, to the detriment of the carriers engaged in interstate commerce, and of such commerce; on the contrary, the Davis case was an isolated case, and the Court was careful to confine its decision to the particular case.

This Court has very recently determined the question at issue. We refer to the case of Davis v. Farmers Co-operative Equity Company, reported in the issue of June 15, 1923, of the U. S. Supreme Court advance opinions, case having been decided May 21, 1923. There the Court had under consideration the effect of a Minnesota statute which provided that any foreign corporation having an agent in that State for the solicitation of freight and passenger traffic over its lines outside of the State might be served with summons by delivering a copy thereof to such agent. The suit was against the Director General of Railroads on a cause of action growing out of a shipment from one point to another in the State of Kansas. Defendant in the action attacked the jurisdiction which was sought to be maintained in the State of Minnesota, on the ground that the Minnesota statute violated the due process, equal protection and commerce clauses of the constitution. It is pointed out in the opinion which was delivered by Mr. Justice Brandeis that jurisdiction under that statute was not limited to causes arising out of business transacted within Minnesota and among other things the Court said:

> "This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause."

And again, this pertinent language is used:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the

> transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use. See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case (Akron C. & Y. R. Co. v. United States) 260 U. S.—, ante 308, 43 Sup. Ct. Rep. 270.

The case at bar comes squarely within the view of that statement. Here, as there, the railroad is a foreign carrier, sued in a State in which the cause of action did not arise, in which it neither owns nor operates a railroad and in which the plaintiff does not reside. In other words, we have brought ourselves strictly within the scope of that opinion. There can be no difference in principle between two statutes, the one undertaking to confer jurisdiction where the railroad has a soliciting agent in a foreign jurisdiction and the other in conferring jurisdiction in such foreign State by the process of garnishment. The burden on interstate commerce and the violation of the commerce clause of the constitution would be and is just as much pronounced in the latter as in the former and the reason for non-liability in the latter jurisdiction is just as great as in the former, so that we express the hope that the Court's conclusion will be the same. This Court has in many cases upheld the contention that the States may not burden interstate

commerce. We have in this connection only to refer to Western Union Telegraph Company against Kansas, 216 U. S. at page 26 where it is said:

> "This Court has guarded with both diligence and firmness the freedom of interstate commerce against hostile State or local action, as such action has been manifested by regulations operating in some instances directly, in others indirectly, upon the means or instruments employed in that commerce."

And again in the same case at page 27 the Court said:

> "But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce can not conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

And to like effect was Sioux Remedy Co. v. Cope, 235 U. S. 197. The Texas Statute as applied in this case burdens interstate commerce and hampers the carrier in the performance of duties imposed by Federal law.

And if the Texas Statute is so construed, petitioner will be deprived of its properties and rights without due process of law. As for instance, while requiring petitioner by the Act to Regulate Commerce, to permit its cars and engines to run into Texas, and to permit garnishee to collect its freight and passenger charges, which it must do, to then further require petitioner to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other States on causes originating in other States and having no relation whatever to any traffic or transportation to or from El Paso, or to any business or things, is not due process of law; but, this is the identical result if the Texas Statute under consideration may be enforced in the circumstances as are herein presented.

The precise question under identical facts was before the District Court, second judicial district, State of Minnesota, in the case of John D. Meeks against this appellant as deffendant and other rail lines as garnishees, and in an opinion rendered in October Judge Sanborn held, following Davis against Farmers Co-operative Equity Company, supra, that traffic balances were not subject to the process of garnishment in an action against a foreign rail line and could not be used for jurisdictional purposes. In other words, that the process of garnishment could not be used as a means

of accomplishing indirectly what this Court in the Farmers Co-operative case held could not be done directly.

We attach hereto as an appendix the judgment of the Court in that case, together with the opinion above referred to. Same is not, of course, binding upon this Court but is instructive and, as we believe, quite persuasive.

Again, and having reference to the cars, engines and other equipment in the possession of the garnishee and of these instrumentalities came to the garnishee under a contract between it and petitioner, under the terms of which contract garnishee was entitled to the use of this equipment in the conduct of its business. Now, may this contract be interfered with, as has been the effect of the garnishment proceedings? We say, No. And in this we are supported by the Supreme Court of Massachusetts. In Koontz v. B. & O. Railroad, 107 N. E., 973, a proceeding similar to this was instituted, prior, however, to the Amendment of the Interstate Commerce Act and the passage of the Transportation Act of 1920. It appeared in that case that the New York, New Haven and Hartford Railroad Company had certain cars in its possession belonging to the B. & O. Railroad which were attached. It was shown that the Trustee received the cars under an arrangement or agreement with the other line, which gave it the right to dispatch them to the place of destination on its own line instead of transferring the freight on its own cars. It was permitted to use the empty cars for carrying freight on its own road,

eac. And after referring to the Davis case the Court said·

> "The cars thus became, for the time being, a part of its equipment and compensation therefor ceased when they passed out of the Trustee's possession and control."

Under this state of fact the Court said:

> "If the Trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. Brown v. Floersheim Mercantile Co., 206 Mass 373, 376, 92 N. E. 494. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. R. L. c 189, pp. 57-65. Cornell v. Mahoney, 190 Mass. 295, 296; 76 N. E. 664; Thompson v. King, 173 Mass., 439; 53 N. E. 910. The bailment can not be said to be violative of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service, and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trustee ought not to be subjected to the expense of unloading, and re-distribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if having been emptied they were collected and retained unused to await the result of litigation. Van Camp Hardware Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Cox v. Central Vermont R. R., 187 Mass. 609, 73 N. E. 775. The Trustee not being chargeable, it becomes unnecessary to determine whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of R. L. c

167 p. 39, relating to the attachment of railroad cars in actual use making regular passages. The order of dismissal is affirmed and the motion of the trustee to be discharged is granted."

We presume that the arrangement there was similar to the one existing in the case at bar.

SECOND: THE WRIT OF ATTACHMENT OR GARNISHMENT MAY NOT BE USED AS A MEANS TO COMPEL A SOLVENT DEFENDANT TO LITIGATE IN A FOREIGN JURISDICTION.

It is admitted that the cause of action arose in the State of New Mexico, at which time Wells was a resident of the State of Colorado; that his claim was an unliquidated demand; that there are in the States of Colorado and New Mexico courts wherein he might assert any cause of action he may have against petitioner, and that petitioner is financially able to respond to any judgment which he might recover against it; that it has in the States of New Mexico and Colorado, as well as other States through which it operates, property subject to execution of value many thousand times greater than any liability which might be found to exist against it on any cause to be so asserted. (Printed Record 36).

That in said cause so to be asserted, the witnesses in behalf of the Railroad Company, material to its defense, are employes whose attendance would be necessary and during which attendance they would be required to absent themselves from their usual and customary labors and the Railroad Company would be deprived of their

services from such ordinary and customary labors during the time of their attendance upon the Court, for which attendance the Railroad Company would be required to pay their expenses and compensation for loss of time; that said witnesses reside in San Marcial, New Mexico, about one hundred and fifty miles from El Paso (Printed Record 38).

That petitioner operates lines of railroad through many counties in New Mexico, including the County of Socorro where plaintiff claims to have been injured, and in which county it has agents upon whom process could be served, as well as courts having jurisdiction of his cause of action (Printed Record 38-39).

That for many years prior to the entry of the final decree in the case of petitioner against J. F. Weeks, et al., No. 109 in Equity on the docket of the District Court of the United States, Western District of Texas, it had been the practice of attorneys residing in El Paso to institute suit against petitioner in the courts of El Paso county, Texas, for injuries occurring to persons in the States of Illinois, Kansas, Colorado, New Mexico; Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that there had been filed prior to the time plaintiff exhibited its bill in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State courts of El Paso County, Texas, for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases, in order to prevent default

it was necessary for petitioner to defend in said causes, and it so defended said causes by bringing numerous employes from their regular work in such other States to El Paso to testify, and during the absence of said employe witnesses from their regular work, substitutes were employed at expense to perform the services of said employes; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State courts of El Paso County, Texas, against petitioner until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against petitioner been instituted in any State through which petitioner operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought. (Printed Record 42).

And under this state of facts, we contend that this is not a bona fide cause in which plaintiff undertook to subject the property of petitioner to the payment of the asserted claim so made in a foreign jurisdiction, but rather that same is an effort to compel this petitioner to come into Texas to defend a personal injury suit. We quote again from Pennoyer v. Neff, 95 U. S., beginning on page 723:

> "So the State through its tribunals may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens, and when

> non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-residents' obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate."

It is not pretended that this is an effort to subject the property of the Railroad Company to satisfy *any claim of a citizen of Texas against it.* Wells was not such a citizen, but it appears to us to be a rather bold-faced effort to import litigation into Texas, and to force the Railroad Company to appear in that State to defend an action against it which is really in personae. Again we quote from Pennoyer v. Neff, wherein the Court cites the following from Boswell's Lessee v Otis, 9 Howard 336, as follows:

> "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

The Court in Pennoyer v. Neff at page 734 also used this language:

> "It is true, that in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

It is therefore submitted that under the record, as well as the history of the many cases formerly imported into El Paso, this can not be and is not substantially a proceeding in rem: that there was no direct purpose to reach and dispose of any property owned by petitioner in Texas. But as before said, that such procedure was adopted merely and only for the avowed purpose of securing a really unfair advantage. It seems perfectly plain that both Wells and his attorneys knew that it was not necessary to either attach or garnishee any property of petitioner in order to save to them an alleged debt. We again quote from Pennoyer v. Neff, pages 730 and 731:

> "As was stated in a subsequent case, the doctrine of this court is that the act 'was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its results, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.' The Lafayette Insurance Company v. French et al, 18 How. 404.
>
> "In all the cases brought in the State and Federal courts where attempts have been made under the act of Congress to give effect in one

> State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force except as to property, or interest in property within the State to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

The real and only just purpose and object to be obtained under the writ of foreign attachment is to secure a claim that can be secured in no other way. A reading of the entire opinion in Pennover v Neff as well as other cases, would seem to be convincing that such is the real office of the writ and the use thereof never justified where the defendant has assets at the place of residence of either himself or the claimant more than sufficient to satisfy any judgment that may be asserted, and we here and now attack the good faith of any proceeding wherein it appears that at the place where the accident

arose, as well as at the place where the claimant resides, the defendant had assets of far greater value than any amount to be claimed, which could be reached in an orderly way under process regularly issued, and yet, such claimant declines to proceed as by law authorized in such cases, but hies himself to a foreign jurisdiction where neither he nor defendant has a domicile, and undertakes to tie up, by extraordinary writ, property of the defendant, which is being used in an orderly way and in the conduct of a business that is essential not only to the well being and happiness, but to the real necessity of the public at large, and to permit such claimant, in these circumstances, to so clog the wheels of commerce and interfere with the orderly process of interstate transportation and tie up its instrumentalities is under the circumstances wholly indefensible. And. to construe a State Statute as authorizing such a procedure would and will be to a railroad company, whose property is thus impounded, lacking in due process of law, a denial to it of the equal protection of the laws, and a burden upon interstate commerce.

It's worse than folly to contend, under the admitted facts, that it was the intention of the plaintiff in the original action to institute a proceeding in rem. This must address itself to the judicial mind, and unless the real object of that proceeding was one in rem, the entire effort should fail. Under such circumstances, every doubt should be resolved against the regularity and good faith of the proceeding. In this connection we can do

no better than quote what was said by the Circuit Court of Appeals in A. T. & S. F. v. Weeks supra. We quote the closing paragraph:

> "When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to the railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the State of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the State can more satisfactorily administer the laws of the State than can the courts of any other State. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a State of the expense of maintaining courts to try causes in which the State has no interest would be difficult to justify The maintenance of the judicial machinery involves no light burden. Many of the States, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other States. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal."

If the position taken there was sound, the situation

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presented by this bill would make its application more obvious than then appeared. The property of a railroad company has a fixed situs and may be readily reached. And again we say that the real object of the suit instituted by Wells, as seems to be plainly indicated from the statement of facts, is and was to force this Railway Company to litigate personal actions in Texas, and that the assumed proceeding in rem was not only more fanciful than real, but there was no excuse for its attempted exercise.

It appears from the statement of facts that many suits have been imported into El Paso which necessarily burdened the defendants and interrupted the service, and as applicable to that situation we again quote from Davis v. Farmers Co-operative Equity Co.:

> "That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation; and that this impairs efficiency in operation and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious. During Federal control absences of employes incident to such litigation were found by the Director General to interfere so much

> with the physical operation of the railroads that he issued General Order No. 18 (and 18 A), which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in Alabama & V. R. Co. v. Journey, 257 U. S. 111, 66 L. ed. 154, 42 Sup. Ct. Rep. 6. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

And the following from the same case:

> "Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The rule of comity will not, of course, be so extended as that its application will burden interstate commerce or deprive the litigant of any right to which it is entitled under the constitution. It is not conceivable that a solvent, going concern that has a fixed place of abode known of all men, with properties subject to execution at given places, and likewise known of all men, may be yanked at the will or caprice of a claimant into a jurisdiction where neither of them has a residence, by the use of the process of garnishment or attachment. Such writs, in our judgment, are never allowable when ordinary process will suffice.

It occurs to us that the circumstances, as made to appear in this case, justify the Court in extending every doubt in favor of petitioner. And, we think the ques-

tion may well be asked: Why the extreme effort to bring actions of this kind in El Paso County, Texas? Are there not many courts of competent jurisdiction within each of the States that have admitted jurisdiction over the Santa Fe Railway Company, wherein causes of action against it may be heard? Is it not entirely solvent and able to respond to any demand that a litigant shall reduce to judgment within any of those jurisdictions? Did this cause of action arise within the State of Texas? Was not the service in which plaintiff was unfortunately injured performed in some other jurisdiction than Texas? Why, then, we again ask, assuming that the answers to each of these questions may be readily given, is there the untiring effort to import this litigation into Texas?

It would seem that the Court is justified in examining each of the propositions we have submitted and that this will enable the Court to apply the law regulating interstate transportation companies under the various provisions of the constitution of the United States under which such companies have their being, and whereby a decree may be entered that will give to this petitioner the protection it deserves and at the same time will be just and fair to respondent; holding, as you must, that Wells had no inherent right to institute his suit in Texas and that it is only by reason of what may be called a fiction that gives him any character of standing in the courts of Texas, and because of this petitioner is undoubtedly entitled to that leaning referred to by Chief Justice Taft in the Clarendon Boat Oar case. It is, of course, the duty of the Court in construing any

statute, not only to consider the plain import of the words used, but likewise the effect of the construction placed, having in mind the object sought. If the cause asserted by Wells can be maintained in Texas under the facts appearing, then action could be maintained in that State against the Boston & Maine Railroad at any place therein where a traffic balance in favor of the Boston & Maine may be found, even though such traffic balance due to the Boston & Maine might be in the hands of a Texas carrier without its knowledge. In other words, practically expressed, a suit for personal injuries could in these circumstances be filed in Texas against any railroad in the United States by the simple method of running a garnishment on a Texas line and tying up the traffic balance of the defendant railroad, and surely it will not be contended that such a construction will accord with the requirements of the Interstate Commerce Act, the Transportation Act of 1920, or the protective provisions of the Constitution of the United States, and on the above our cause is respectfully submitted

J. W. TERRY,

A. H. CULWELL,

Attorneys for Petitioner Appellant.

GARDINER LATHROP,

Of Counsel.

APPENDIX

STATE OF MINNESOTA,
COUNTY OF RAMSEY. DISTRICT COURT,
SECOND JUDICIAL DISTRICT

JOHN D. MEEKS,
Plaintiff,

vs. No. 153273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant,

and

Chicago, St. Paul, Minneapolis & Omaha Railway Company, Chicago Great Western Railroad Company, Minneapolis & St. Louis Railroad Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, Burlington & Quincy Railroad Company and Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Garnishee Defendants.

This cause came on to be heard on the 8th day of October, in Chambers, upon the motions of the defendant and the garnishee defendants to dissolve and dismiss the garnishment proceedings herein, to discharge the garnishees and each of them, to quash and vacate the garnishment summons herein, the service thereof and also the summons herein and the service thereof and all proceedings subsequent thereto. Barton & Kamuchey appeared for the plaintiff, and Sanborn,

Graves & Ordway appeared for the defendant and the garnishee defendants.

After hearing the arguments of counsel, and upon due consideration, it is

ORDERED that the motions of the defendant and the garnishee defendants be and the same are hereby in all things granted, that the garnishees be discharged. the garnishee summons herein vacated, together with the service thereof, and the summons herein and the service thereof upon the defendant discharged, together with all subsequent proceedings.

Dated October _____ 1923.

MEMORANDUM

The plaintiff is a resident of Kansas. The defendant is a foreign corporation organized under the laws of that state, a common carrier of freight and passengers, having no line of railway in this state and doing no business here, except to solicit traffic in interstate commerce. Its lines extend from Chicago westward through states other than this to California.

In December, 1922, the plaintiff commenced an action in Freeborn County, in the Tenth Judicial District, against the defendant for personal injuries, on a cause of action which arose in the state of Kansas and which did not grow out of any transaction entered upon within the state of Minnesota, service of process being made upon an agent for the solicitation of traffic, pursuant to Section 7735. Gen. Stat. 1913.

Thereafter, in February, 1923, an action was commenced by the same plaintiff against the same de-

fendant upon the same cause of action, by the same attorneys, in Scott County, in the Eighth Judicial District, service being made in the same manner. The latter action came on for trial, and the plaintiff had a verdict.

Upon the coming down of the decision of the United States Supreme Court in the case of *James G. Davis Director General of Railroads, vs. Farmers' Cooperative Equity Company*, reported in 43 Sup. Ct. Rep. at p. 586, holding that Sec. 7735 Gen. Stat. 1913, was unconstitutional, the defendant made a motion to set aside this verdict, which motion was granted on September 5, 1923. On October 4, 1923, the plaintiff appealed from the order setting aside the verdict, to the Supreme Court of the state of Minnesota, which appeal is now pending.

This action was then commenced by publication of summons, after garnishment of traffic balances arising out of interstate commerce and representing the amount due to the defendant from the garnishee railways out of various transactions connected with such commerce.

The principal contention of the defendant is that the statutes of this state relating to garnishment, being Sections 7737, 7738 and 7859 to 7887 Gen. Stat. 1913, if construed so as to permit the courts to acquire jurisdiction of an action such as this, are unconstitutional because in conflict with Art. 1, Sec. 8, Subdiv. 3 (the interstate commerce clause of the Constitution of the United States) in that they impose a serious and unreasonable burden upon interstate commerce.

Unless the case of *Davis vs. Farmers' Cooperative Equity Company*, referred to above, is controlling, the position of the defendant cannot be sustained. In this state the case of *Starkey vs. CCC&St.L. Ry. Co.*, 114 Minn. 27, is authority for the proposition that jurisdiction can be acquired by garnishment of traffic balances and that subjecting a fund consisting of such balances arising from interstate business to the payment of an indebtedness is not of itself an interference with interstate commerce. Under this decision and the other decisions cited therein, the only limitation upon garnishment in these cases is that it cannot be applied to a garnishee debtor temporarily within the state, this being held in *McKinney vs. Mills*, 80 Minn. 478, in which case the plaintiff, the defendant and the garnishees were all non-residents, none of them being in the state except the garnishee, who was served with summons while within the borders temporarily.

The case of *Davis vs. CCC&St.L. Ry. Co.*, 217 U. S. 157, directly holds that cars owned by a foreign railway Company temporarily in the state in the course of interstate transportation through the agency of other carriers are subject to attachment under state laws, and that sums due to such a carrier from other carriers may be garnished under state laws. Another case holding that jurisdiction may be properly acquired in this way is *AT&SF v. Wells*, 285 Fed. 269.

The important question, therefore, is whether the Supreme Court of the United States has either expressly, of by necessary implications, by its decision in the case of *Davis vs. Farmers' Cooperative Equity Company* held

that in such actions as this one jurisdiction cannot be so acquired. If it has, the motion of the defendant should be granted; if it has not, the motion should be denied.

The conclusion that the Court reaches in that case is that Sec. 7735 Gen. Stat. 1913, which provides that:

> "Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic, or either thereof, over its lines outside of this state may be served with summons by delivering a copy thereof to such agent."

violates the federal constitution, because in violation of the commerce clause thereof. It was contended in that case that the statute was not only void for that reason but because it violated the due process and equal protection clauses of the 14th amendment. The Court says this in support of its conclusion:

> "Solicitation of traffic by railroads in states remote from their lines is a recognized part of the business of interstate transportation. As construed by the highest court of Minnesota, this statute compels every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state. Jurisdiction is not limited to suits arising out of business transacted within Minnesota. It is asserted whatever the nature of the cause of action, wherever it may have arisen and although the plaintiff is not and never has been a resident of the state. This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause.
>
> "That the claims against interstate carriers

for personal injuries and for loss and damage of freight are numerous, that the amounts demanded are large, that in many cases carriers deem is imperative or advisable to leave the determination of their liability to the courts, *that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation and that this impairs efficiency in operation and causes directly and indirectly heavy expense to the carriers—these are matters of common knowledge.* Facts of which we also take judicial notice indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one and that the resulting obstruction to commerce must be serious. During federal control absences of employes incident to such litigation were found by the Director General to interfere so much with the physical operation of the railroads that he issued general order No. 18, (and 18-a) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & V. R. Co. vs. Journey*, 257 U. S. 111; 66 L. Ed. 154; rw Supt. Ct. Rep. 6. *"The facts recited in the order to justify its issue are of general application in time of peace as well as war."*

The Court then goes on to say, that the fact that the business carried on by a corporation is entirely interstate does not render the corporation immune from the ordinary process of the courts of the state and that the requirements of orderly, effective administration of justice are paramount. It then states:

"It may be that a statute like that here assailed would be valid although applied to

> suits in which the cause of action arose elsewhere, *if the transaction out of which it arose had been entered upon within the state* or if the plaintiff was, when it arose, a resident of *the state*. These questions are not before us and we express no opinion upon them. *But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside.* The public and the carriers are alike interested in maintaining adequate uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on the property devoted to the public use. *Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public.* With these ends the Minnesota statute as here applied unduly interferes, by requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The Court then points out that certain cases theretofore decided by it resemble the case at bar; that in two of such cases the validity of similar statutes was sustained as against the objection that they were in violation of the due process clause, but that since the Minnesota statute is held to be in violation of the commerce clause, the Court has no occasion to consider whether it also violates the 14th amendment.

It is perfectly clear that under this decision an ac-

tion such as the plaintiff brings cannot be maintained where service is secured merely upon a soliciting freight agent of the defendant, although the Supreme Court does not say that such service would not be due process of law. In other words, assuming that the Court would otherwise have jurisdiction, it has no jurisdiction in the presence of the commerce clause.

Can an action which cannot be brought by service in accordance with Sec. 7735 as an action *in personam* be converted by garnishment of traffic balances to a proceding *in rem* and thus confer upon the courts of Minnesota jurisdiction which they could not acquire in the other way? The Davis v. Farmers Equity case refers to conditions which have arisen from the operation of Sec. 7735, and which have become burdensome and obnoxious.

The practice in the state in the past so far as cases such as this are concerned has been to serve on the soliciting agent. The number of cases that has been brought by garnishment of traffic balances is of course inconsequential. It is apparent, however, if jurisdiction can be obtained in this way, that exactly the same class of lawsuits which the Supreme Court of the United States refers to will be brought here by this method. It is possible that the roads affected could avoid this by changing their manner of doing business and having no traffic balances in the state. It is difficult, however, to see why that should change the question of law or why a proceeding *in rem* should be any different from a proceeding *in personam*, except that it is if

anything more cumbersome and burdensome to all parties concerned.

If the requirements of orderly, effective administration of justice require it, however, the Court must sustain the practice. But the Supreme Court has said:

> "Orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in the state in which the cause of action did not arise, in which the transportation giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad and in which the plaintiff does not reside."

From the standpoint of the avoidance of waste in interstate transportation which the Supreme Court emphasizes, it is apparent that the effect of a proceeding of this kind, where jurisdiction is obtained by garnishment, is the same as it would be if obtained by service on an agent, the same witnesses will have to attend, the same expense will be entailed and the same burdens will be imposed upon the carriers and upon the public.

The U. S. Supreme Court evidently is in doubt as to whether justice does not require that a foreign carrier submit to the jurisdiction of our courts where the plaintiff is a resident of the state, or where the transaction giving rise to the cause of action was entered upon within the State, in spite of the burden imposed on interstate commerce thereby. In the absence of a ruling of the Court on that point it is probable we shall have to follow our own decisions in such cases, whether *in personam* or *in rem* and assume jurisdiction.

To reach the conclusion that the plaintiff in this case cannot obtain jurisdiction in this way it is not necessary to over-rule the cases holding that garnishment of traffic balances is not interference with interstate commerce. In the Davis v. Farmers Equity case the Court does not so much complain of the manner of obtaining jurisdiction as it does of the fact that it is used to bring before our courts cases which belong in other jurisdictions, the trial of which here is unjust and unreasonable both as to the carriers themselves and the public, which maintains them.

So here it is not the garnishing of traffic balances which creates the burden, but the using of garnishment to obtain jurisdiction in cases which cause an unreasonable obstruction to and an undue burden on interstate commerce.